No. 14-1524

IN THE
Supreme Court of the United States

DIRECTV, INC., AND ECHOSTAR SATELLITE L.L.C., NOW KNOWN AS DISH NETWORK L.L.C.,
Petitioners,

v.

RICHARD H. ROBERTS, COMMISSIONER OF REVENUE, STATE OF TENNESSEE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TENNESSEE COURT OF APPEALS

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

This and the companion petition[1] present a recurring question of national importance: When are two entities "similarly situated" within the meaning of the dormant Commerce Clause? This is a threshold inquiry that, when properly undertaken, merely asks whether the differently regulated entities compete with one another; if so, substantive review under the dormant Commerce Clause is triggered. In short, this inquiry performs a modest screening function, and leaves the heavy lifting for the subsequent analysis of whether the regulation discriminates against interstate commerce, and whether the state can prove that such discrimination is necessary to advance legitimate interests.

Tellingly, the Commissioner does not seriously dispute the significance of the issue. Nor could he. Because it is a threshold question, it arises in every dormant Commerce Clause case; it has tremendous implications for the functioning of interstate markets; and, in this one context alone, the issue affects tens of millions of U.S. households that subscribe to pay-TV service. The decision below, along with similar rulings of other courts, threatens great mischief by dispensing with dormant Commerce Clause claims at a preliminary stage even when states have regulated in a blatantly protectionist fashion.

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[1] Pet. for Writ of Cert., *DIRECTV, LLC v. Commonwealth of Mass. Dep't of Rev.*, No. 14-1499 (June 18, 2015) (hereinafter, "Mass. Pet.").

Critically, the Commissioner also does not meaningfully dispute the conflict in the lower courts. Instead, he quibbles about its contours. He does not dispute that, when assessing whether the businesses affected by a challenged law are similarly situated, certain courts focus on whether the businesses are in competition, while other courts consider a grab-bag of factors. And while the Commissioner insists that *some* courts in the first camp have not categorically excluded factors besides competition, he does not deny that these courts' competition-focused approach looks utterly different from the freewheeling approach of courts in the second camp. Nor does he deny that the decisions concerning differential regulation of cable and satellite reflect vigorous disagreement, including on the specific question presented here.

Ultimately, the Commissioner offers a tepid defense of the reasoning below. Rather than trying to explain why the regulatory differences identified by the court should be dispositive as a matter of logic or precedent, he offers up various other arguments that the court did not adopt. Even if those alternative arguments were relevant, the Commissioner's assertions about them are wrong—and most directly relevant here, the Commissioner's effort to shoehorn them into the "similarly situated" analysis highlights how muddled Commerce Clause doctrine has become. The question here concerns what is supposed to be a modest inquiry into whether a challenged law differentiates among competitors and therefore is potentially protectionist. The court below, and others like it, have distorted that inquiry

beyond recognition. The Court should intervene to impose much-needed order.

ARGUMENT

I. The Split Is Real, And Lower Courts Need Guidance About What Makes Businesses "Similarly Situated."

A. The overarching split

The petitions explain that state and federal courts are nearly evenly split between two camps. Pet. 18-24; Mass. Pet. 15-25. Courts in the first camp correctly understand that the "similarly situated" requirement involves a straightforward, threshold inquiry: Do the entities affected by an allegedly discriminatory state law compete in the relevant market? Once they have resolved this (often easy) question, they consider (1) whether the challenged law differentiates between products or producers in a way that benefits in-state interests at the expense of out-of-state interests, and if so, (2) whether the state can prove that the discrimination is necessary to advance legitimate interests. *See* Mass. Pet. 16-20.

Meanwhile, courts in the second camp deny—quite explicitly—that competition is the touchstone of the inquiry. They sweep in various factors that ought to be considered at later stages of the Commerce Clause analysis, and haphazardly invoke them as reasons for concluding that favored and disfavored entities are not similarly situated. In so doing, they turn a basic gatekeeping device into the

whole ballgame. *See* Mass. Pet. 20-23. This is the camp with which the court below aligned itself.

The Commissioner's main response is a non sequitur. He suggests that the Commerce Clause allows states to differentiate among competitors based on differences in "'the nature of their businesses.'" Opp. 8-9 (quoting *Amerada Hess Corp. v. Dir., Div. of Taxation, N.J. Dep't of Treasury*, 490 U.S. 66, 78 (1989)). But the cases the Commissioner invokes concern the substantive analysis of whether a differential regulation is discriminatory—not the antecedent "similarly situated" question presented here. *See Amerada Hess*, 490 U.S. at 75-79. Moreover, the Commissioner's argument—that states have free rein to regulate on the basis of claimed operational differences—is wrong, and the Tennessee court rejected it. Pet. App. 20a. His collateral attack on the decision below only highlights the need for review—and all the more so given that this, too, is a question on which the lower courts are deeply divided.[2]

The Commissioner also contends that the split is not *that* stark because, he says, courts in the first camp have not always stated categorically that competition is the exclusive criterion for assessing whether entities are similarly situated. Opp. 9-10. But he does not deny that some courts have stated the rule unequivocally. *E.g.*, *Smith v. New Hampshire Dep't of Revenue Admin.*, 813 A.2d 372, 377 (N.H. 2002) ("Entities are 'substantially similar' or 'similarly situated' … when they compete against

[2] *See, e.g.*, Pet. for Writ of Cert., *DIRECTV, Inc. v. Levin*, No. 10-1322 (Apr. 27, 2011).

one another in the same market."). Elsewhere he argues that the Kansas Supreme Court has qualified its position by stating "that '[*g*]*enerally*, entities are similarly situated if they serve the same market.'" Opp. 10 (quoting *Miami Cnty. Bd. of Comm'rs v. Kanza Rail-Trails Conservancy, Inc.*, 255 P.3d 1186, 1203 (Kan. 2011)). This is more weight than that one wiggle word can bear; in Kansas, the "essential" question remains whether the favored and disfavored entities "serve the same market." *In re CIG Field Serv. Co.*, 112 P.3d 138, 146 (Kan. 2005).

The key point, which the Commissioner does not address, is that even if some courts in the first camp truly had left themselves wiggle room to look beyond competition, the competition-centered analysis they perform bears little resemblance to the freewheeling inquiry undertaken by courts in the second camp. That is why the Commissioner cannot even attempt to reconcile the decision below with the First Circuit's decision in *Family Winemakers of California v. Jenkins*, 592 F.3d 1 (1st Cir. 2010), a case highlighted in the petition (at 19-20). The First Circuit held that the large and small wineries affected by the challenged law competed with one another and therefore were similarly situated. 592 F.3d at 4-5, 10. Unlike the court below and its compatriots, the First Circuit did not inject other considerations—like the existence of differing federal regulations on small and large wineries, *see id.* at 15-16 & n.18—into that threshold determination. Its discussion of the issue was appropriately short and to the point. It then proceeded to the substantive Commerce Clause analysis—whether the law discriminated against interstate commerce (it did) and whether the discrimi-

nation was justified (it was not). The Seventh Circuit, Eleventh Circuit, and Florida Supreme Court likewise do not make mountains out of "similarly situated" molehills. *See* Mass. Pet. 18-20. When favored and disfavored entities compete, these courts direct their focus to the core questions of geographic discrimination and justification.

B. The particular cable/satellite split

The conflict of authority set forth above is ample reason to grant review. But even more striking is the conflict of authority in *this particular context*—i.e., whether cable and satellite providers are similarly situated. *See* Pet. 22-24. The Commissioner acknowledges that the decision below is directly contrary to the recent decision of a Florida appellate court. *See DIRECTV, Inc. v. State Dep't of Revenue*, __ So.3d __, 2015 WL 3622354, at *4 (Fla. Dist. Ct. App. June 11, 2015). True, that decision has been appealed, but that is no reason to delay review. The arguments on both sides have been fully aired. No matter what happens in Florida, the principal split will remain entrenched. There is no guarantee that the Florida Supreme Court will ultimately resolve the case in a way that provides a clean vehicle for this Court's review. And the different results in Florida and below confirm that the choice of "similarly situated" standard is outcome-determinative: An inquiry focused on competition produces a different result than a freewheeling inquiry, and does so in the particular circumstances here.

The Commissioner contends that (Florida aside) lower courts have rejected the Commerce Clause

claims of satellite providers. Opp. 6-7. A closer look, however, reveals two features highlighting the need for review.

First, even the courts that have denied relief have differed in their reasoning—to the point of sometimes explicitly disagreeing with each other. *Cf.* Opp. 8 ("these decisions vary somewhat in their modes of analysis"). The Ohio Supreme Court, for instance, did not even dwell on the threshold "similarly situated" inquiry. Instead, it found no discrimination because it concluded, erroneously, that a state may enact a law with discriminatory effects so long as it frames the law in terms of the businesses' methods of operation. *DIRECTV, Inc. v. Levin*, 941 N.E.2d 1187, 1195 (Ohio 2010). And, underscoring the division of authority, the decision below went out of its way to criticize the Ohio court's reasoning. *See* Pet. App. 20a-21a & n.9.

Indeed, the decision below is not even fully in accord with the Massachusetts decision it purported to follow. *See* Pet. 23. The Tennessee court relied on differing federal regulations applicable to cable and satellite as the reason for deeming them differently situated. Pet. App. 29a-31a. The Massachusetts court relied on different and additional factors, including its view of the tax scheme's overall fairness. *DIRECTV, LLC v. Dep't of Rev.*, 470 Mass. 647, 655-58 (2015).

Second, the most thoughtful opinions in these cases are in satellite's favor. But it is no surprise that there are opinions on the other side: These cases threaten entrenched interests that support state

and local economies with significant tax dollars, and it is predictable that these challenges do not always fare well in the state courts where they usually must be brought. What is notable is that, even so, multiple judges have explained persuasively and in detail why disparate cable-satellite taxes violate the Commerce Clause. *See* Pet. App. 35a-74a (Tennessee Chancery Court); *Levin*, 941 N.E.2d at 1197-1202 (Brown, C.J., dissenting); *DIRECTV, Inc. v. Wilkins*, No. 03CVH06-7135 (Ohio Ct. C.P., Franklin Cnty., Oct. 17, 2007). These opinions have fully aired the issues for this Court's review.

II. The Decision Below Conflicts With Established Precedent.

A. The Commissioner offers little meaningful defense of the lower court's reasoning. As the petition explains (at 24-26), this Court views the inquiry as a basic threshold assessment of whether there is competition between the entities differentially affected by a tax or regulation. If the affected entities do not compete, "the dormant Commerce Clause has no job to do." *General Motors Corp. v. Tracy*, 519 U.S. 278, 303 (1997).

Here, although it is undisputed that cable and satellite compete vigorously, the court deemed them not similarly situated because the federal government imposes certain different regulations. But neither the court below nor the Commissioner has ever explained why these regulatory differences matter. Certainly they do not render cable and satellite providers so distinct that they do not compete. To the contrary, all agree that consumers view these ser-

vices as similar and substitutable. The state's differential tax thus functions in a protectionist manner, advantaging pay-TV products that are locally produced and distributed, and disadvantaging comparable products that are not. And when, as here, "competition would … be served by eliminating [the] tax differential," the dormant Commerce Clause has a very important "job to do." *Tracy*, 519 U.S. at 303.

Contrary to the Commissioner's assertions, this Court's precedents do not "indicate that factors besides competition may be relevant to the ['similarly situated'] inquiry." Opp. 10. *Tracy* certainly does not. Rather, it makes clear that the inquiry centers on whether affected entities "provide different products" that "serve different markets." 519 U.S. at 299. *Tracy* itself presented a tougher-than-usual "similarly situated" question only because—unlike here—it involved two separate markets: a primary market in which the affected entities did not compete, and a secondary market in which they did. *Id.* at 301-04. The Court thus had to weigh various factors to decide which market should have "controlling significance." *Id.* at 303. Here, there is only one relevant market and it is undisputedly, fiercely competitive.

The second case the Commissioner references—*Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), *cited at* Opp. 10-11—is not relevant at all. *Exxon* does not even contain the words "similarly situated." As the Commissioner recognizes, the affected entities "directly competed" with each other. Opp. 10. Thus, the Court proceeded beyond the "similarly situated" threshold to conduct a substantive assessment of whether the differential treatment

amounted to improper local favoritism, which it did not. *See* 437 U.S. at 125-26.

B. The balance of the Brief in Opposition is a mish-mash of arguments whose place in the Commissioner's legal analysis is unclear. Opp. 2-3, 11-12. The Commissioner does not explain whether these additional contentions should be folded into the "similarly situated" inquiry (which would make that threshold analysis unwieldy), or if he thinks these are alternate bases for affirmance (which would properly be addressed on remand). This uncertainty only highlights the need for review.

First, the Commissioner criticizes what he calls Petitioners' "'economic footprint'" theory of discrimination. Opp. 12. But this is not Petitioners' theory. Our contention is that Tennessee's differential tax has the effect of rewarding businesses that perform certain activities and maintain certain facilities within the state (cable), and penalizing those that do not (satellite). Moreover, this issue speaks to whether the statute has a discriminatory effect; it is not part of the threshold, "similarly situated" inquiry.

Second, the Commissioner contends that Tennessee's tax scheme cannot discriminate against interstate commerce because the major cable and satellite providers are "out-of-state businesses." Opp. 3, 11-12. But this argument likewise goes to the merits, not the "similarly situated" inquiry. And the court below *rejected* this contention precisely because it is contrary to this Court's precedents. Pet. App. 21a.

Third, the Commissioner downplays the extent of the discrimination by arguing that, if you add in a *different* tax on cable, cable customers face a higher "total potential tax rate" than satellite customers. Opp. 1. The Massachusetts court embraced an argument of this sort, 470 Mass. at 657-59; the Tennessee court did not. But this is irrelevant to whether cable and satellite are similarly situated, and it is not even part of assessing discriminatory effect—it is part of the separate question of whether the differential treatment can be justified. Such claims of overall tax fairness are governed by an entirely different doctrine—the "compensatory tax doctrine," *see Fulton Corp. v. Faulkner*, 516 U.S. 325, 331-39 (1996)—whose rigorous requirements the Commissioner has not attempted to satisfy.

Finally, the Commissioner observes that the Telecommunications Act of 1996 "preserved the authority of the states to tax [satellite] services and to distribute revenues derived therefrom to local governments." Opp. 2. But again, this is not an argument about "similarly situated"; it is a claim that otherwise discriminatory conduct was authorized. It is an issue that the lower court did not reach. And the contention is wrong. Congress must be "'unmistakably clear'" if it wishes to authorize discrimination against interstate commerce, *Maine v. Taylor*, 477 U.S. 131, 139 (1986), which the Telecommunications Act is not.

III. These Cases Are The Right Vehicle For Addressing This Important Issue.

The Commissioner does not deny the importance of the question presented. Nor could he. Even at its narrowest, this issue directly affects tens of millions of pay-TV subscribers. And it has broader implications for numerous other industries, especially ones where innovative upstarts threaten entrenched and politically powerful local competitors. *See* Pet. 26-27; Mass. Pet. 34-37. The Commissioner also does not dispute that vehicles rarely come as clean as this one. *See* Pet. 27.

Instead, the Commissioner says the petition should be denied because the Court has declined to review a few other dormant Commerce Clause cases. Opp. 5-6. But the Court of course denies most petitions. What's more, the first of the cases identified by the Commissioner (Opp. 5) addressed a different issue. *Levin*, 941 N.E.2d 1187, *cert. denied*, 133 S. Ct. 51 (2012), did not raise the "similarly situated" question; it presented two other questions concerning the substantive assessment of discrimination against interstate commerce. Pet. for Writ of Cert., *DIRECTV, Inc. v. Levin*, No. 10-1322 (Apr. 27, 2011). Those are important questions, and the Ohio Supreme Court's resolution of them was problematic. But the "similarly situated" rulings here and in Massachusetts are equally pernicious. They muddle the dormant Commerce Clause, and threaten to nullify its protections.

The Commissioner also points to *National Association of Optometrists & Opticians v. Brown*, 567

F.3d 521 (9th Cir. 2009), *cert. denied*, 133 S. Ct. 1241 (2013). The question there was more akin to the one presented here, but the split in authority was not as starkly presented and, in contrast to this case, there were more substantial arguments that the question would not be outcome-determinative. And most important, the Tennessee and Massachusetts decisions confirm that the split of authority is expanding. If anything, then, these prior petitions reinforce the need for review. They show that the issue presented here is recurrent. Dormant Commerce Clause cases are creating difficulties for the lower courts, and the doctrine is in a state of growing disarray. This Court's intervention is appropriate now and in these cases.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari; or, in the alternative, grant the companion petition and hold this one.

Respectfully submitted,

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